No. 15696

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARTY W. LANDAU, doing business as RIVERSIDE RANCHO,

Appellant,

vs.

ROBERT A. RIDDELL, Individually and as District Director of Internal Revenue for the Sixth District of California,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

Opinion Below.

The decision of the District Court [R. 17-25] is not officially reported.

Jurisdiction.

This appeal involves federal excise taxes for taxable period December 1, 1949, to November 1, 1951. During that period taxpayer paid $19,590.93 in excise (cabaret) taxes. [R. 21.] Claim for refund was filed on January 25, 1954, and was rejected on March 15, 1956. [R. 21.] Within the time provided in Section 6532 of the Internal

Revenue Code of 1954 and on August 21, 1956, the taxpayer brought an action in the District Court for recovery of the taxes paid. [R. 3-8.] In 1954 the Commissioner of Internal Revenue had assessed additional excise (cabaret) taxes for the period October, 1950, through October, 1951, which with interest amounted to $5,330.49. [R. 21-22.] Taxpayer paid $880.49 in payments in 1955 reducing the additional assessment to $4,450. [R. 22.] The United States of America by leave of court filed a complaint in intervention against taxpayer to recover the $4,450 in said taxes. [R. 12-15.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1346. The judgment was entered on May 16, 1957. [R. 25.] Within 60 days and on July 15, 1957, a notice of appeal was filed. [R. 26.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Questions Presented.

1. Whether the District Court erred in holding that the provisions of Section 404(a) of the Revenue Act of 1951 (applicable only with respect to taxable periods commencing on November 1, 1951, by the provisions of Section 404(b) of the 1951 Act), amending Section 1700(e) of the Internal Revenue Code of 1939, were not to be retroactively applied to the taxable period extending from December, 1949, to and including October, 1951, involved herein.

2. Whether taxpayer's establishment was a cabaret, roof garden, or similar place subject to the tax imposed by Section 1700(e) of the Internal Revenue Code of 1939 even if Section 404(a) of the Revenue Act of 1951 were to be retroactively applied to the taxable period in question.

Statutes and Other Authorities Involved.

The statutes and other authorities involved are set forth in the Appendix, *infra.*

Statement.

Since 1948 taxpayer has operated the Riverside Rancho, an establishment providing dancing privileges, food, other refreshments, and checkroom services. [R. 21.] The establishment consisted of a fenced-in area approximately one acre in size containing two large buildings about 100 feet apart. [R. 59-61.] One building contained a 7,000 square foot dance area and a liquor bar containing about 30 bar stools. Access from the dance area into the liquor bar was via a five-foot opening which was never closed. [R. 60.] Patrons could pass freely between the bar and the dance area. [R. 60-61.] A milk bar in an uncovered patio was located about 35 feet from the dance area. [R. 60.] The other large building had a dining room of approximately 400 square feet on the second floor. [R. 61]. Separate access to the dining room was cut off at 8:00 p.m. [R. 62.] Thereafter all patrons including those then in the dining room had to pay the admission charge of $1.20.[1] [R. 61-62.] Once within the enclosed area patrons had access to any part or facilities therein without additional charge. No refreshments were allowed in the dance area. It was not possible to hear inteiligible strains of music in the liquor bar, the milk bar or in the dining room. [R. 63-64.] The prices charged apparently were equivalent to the normal retail prices. [R. 65.]

During the period December 1, 1949, through November 1, 1951, taxpayer filed excise (cabaret) tax returns

[1]A minor change in the admission rate was made in June of 1950 but is not relevant herein. [R. 61.]

and paid $19,590.93 in cabaret taxes. On January 25, 1954, taxpayer filed a claim for refund which was rejected on March 15, 1956. In 1954 additional cabaret taxes were assessed against taxpayer for October, 1950, through October, 1951, totaling, with interest, $5,330.49. In 1955, taxpayer made payments amounting to $880.49 against the additional assessment, resulting in a balance owing of $4,450.00. [R. 21-22.] In 1956 the United States of America filed a complaint in intervention against taxpayer to recover the $4,450.00 plus penalties and interest. [R. 12-15.]

The District Court held that taxpayer was subject to the excise (cabaret) tax imposed by Section 1700(e) of the Internal Revenue Code of 1939 for the period December 1, 1949, to November 1, 1951. The District Court also held that the 1951 amendment to Section 1700(e), specifically exempting from the cabaret tax those ballrooms, dance halls or other similar places in which the serving and selling of food and refreshments is incidental, is applicable only with respect to periods commencing November 1, 1951. [R. 24.] The District Court entered judgment dismissing the taxpayer's complaint and awarding judgment to the United States of America under its complaint in intervention. [R. 25.] Taxpayer appealed from both judgments. [R. 26.]

Summary of Argument.

During the period in question, December 1, 1949, to November 1, 1951, Section 1700(e) of the Internal Revenue Code of 1939 imposed the so-called cabaret tax upon establishments falling within the classification "roof garden, cabaret or other similar place." The section defined this phrase to include any room in any restaurant, hall, or other public place where music and dancing

privileges are afforded patrons in connection with the serving or sale of food, refreshments, or merchandise. It was established by case law that ballrooms and other similar establishments fell within the meaning and application of Section 1700(e) even though the sale of food or refreshments was merely incidental. Under the applicable law, it clearly is subject to the cabaret tax.

In 1951 Congress amended the section to avoid the court constructions by excluding from the tax those ballrooms or other similar places in which the serving of food, refreshments, or merchandise is "merely incidental." This amendment, by its terms, was expressly made applicable only with respect to taxable periods beginning after November 1, 1951.

However, taxpayer contends that the 1951 amendment was merely a clarifying amendment declaratory of existing law and should be given retroactive effect as part of the section applicable to the period in question. The District Court correctly rejected this contention on the basis of the express prospective effective date in the amendment and also on the basis that an amendatory statute will not be given retroactive effect unless its terms so provide. The District Court is supported by the legislative history which indicates that Congress intended to and did effectuate a change. The District Court, applying the section as it stood prior to the 1951 amendments, dismissed taxpayer's complaint and awarded judgment to the United States of America under its complaint in intervention.

Furthermore, even if the amendment were to be retroactively applied, taxpayer's establishment is not a ballroom or other similar place in which the sale of food, refreshments, or merchandise is merely incidental and therefore it remains subject to the tax.

ARGUMENT.

I.

The Provisions of Section 404(a) of the Revenue Act of 1951, Amending Section 1700(e) of the Internal Revenue Code of 1939, Do Not Apply to the Taxable Period Involved in This Case.

The principal question to be decided is whether Section 404(a) of the Revenue Act of 1951 (Appendix, *infra*), amending Section 1700(e)(1) of the Internal Revenue Code of 1939 (Appendix, *infra*), is to be applied retroactively, so as to relieve taxpayer of his liability for so-called cabaret taxes assessed for the period December 1, 1949, to November 1, 1951. As the Director contends and the District Court held, the 1951 amendment is applicable only with respect to periods commencing November 1, 1951, and the taxpayer's establishment is subject to the cabaret tax imposed by Section 1700(e)(1).

The broad problem is essentially one of definition: Is a particular establishment a roof garden, cabaret or similar place within the meaning of Section 1700(e)(1) or is it not? Taxpayer contends that any ballroom is not a "roof garden, cabaret, or similar place" within the meaning of this section and then assumes the issue by terming his establishment a "ballroom." (Br. 5-11.) Prior to the 1951 amendment, ballrooms and similar establishments were taxable as cabarets even though the service or sale of food, refreshments or merchandise was merely incidental. *Avalon Amusement Corp. v. United States,* 165 F. 2d 653 (C. A. 7th); *Birmingham v. Geer,* 185 F. 2d 82 (C. A. 8th), certiorari denied, 340 U. S. 951. To avoid this broad construction, the 1951 amendment exempted from the cabaret tax bona fide dance halls, ballrooms and other similar places where the serving or selling

of food, refreshments, or merchandise is merely incidental to the music and dancing privileges furnished, unless the conduct of the place is such as to bring it within the normal concept of a roof garden, cabaret, or similar place. However, unless this 1951 amendment is effective during the period in question, even if taxpayer's Riverside Rancho could be found to be a ballroom in which the sale of refreshments was incidental, it would be taxable under Section 1700(e) as it stood prior to the 1951 amendment.

Section 1700(e) of the Internal Revenue Code, as amended, imposes an excise tax of 20 per cent (commonly referred to as the cabaret tax) on amounts paid for admission, refreshment, service, or a public performance for profit. The term "roof garden, cabaret, or other similar place" is defined by Section 1700(e) to include "any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise." Section 1700(e) also provides that a performance shall be regarded as being furnished for profit even though the charge made for admission, refreshment, service, or merchandise did not increase by reason of the furnishing of such performance. Substantially the same definition is given to the above terms by Section 101.14, Treasury Regulations 43 (Appendix, *infra*).

On January 28, 1948, The United States Court of Appeals for the Seventh Circuit decided the case of *Avalon Amusement Corp. v. United States,* 165 F. 2d 653, wherein it was held that a dance hall or ballroom was liable for the cabaret tax under Section 1700(e) of

the Code, as then amended, and that such tax applied to all amounts paid by patrons for food, refreshment, or merchandise in connection with the furnishing of music or dancing.

In 1948, taxpayer took over the Riverside Rancho [R. 33] and began paying cabaret taxes. [R. 36.] Taxpayer continued to pay cabaret taxes during the period in question, December 1, 1949, through November 1, 1951, with certain of those payments being made up to December 31, 1951. (Br. 1.)

After the decision in the *Avalon* case, *supra,* the question as to whether or not the cabaret tax under Section 1700(e) should be applied to dance halls and ballrooms again arose in *Geer v. Birmingham,* 88 Fed. Supp. 189 (N. D. Iowa), wherein the District Court held that ballrooms of the type and kind operated therein were not subject to the cabaret tax under Section 1700(e). On appeal, the United States Court of Appeals for the Eighth Circuit reversed (*Birmingham v. Geer,* 185 F. 2d 82, certiorari denied, 340 U. S. 951), holding that the dancing establishment involved in that case fell within the reach of Section 1700(e) with regard to both the character of the establishment and the nature of the entertainment furnished to its patrons. That is, the music and dancing privileges were afforded in connection with the serving of refreshments, and the music and dancing privileges furnished constituted a public performance for profit within the meaning of that term as used in Section 1700(e). In so holding the Eighth Circuit relied upon the plain language of Section 1700(e) and supported its conclusion with excerpts from the decision of the Seventh Circuit in the *Avalon* case, *supra,* wherein that court, likewise rely-

ing on the plain language of the section, held, as we have pointed out above, that Section 1700(e) was applicable to a dancing establishment.[2]

After the Eighth Circuit decision in *Birmingham v. Geer, supra,* Congress, through Section 404(a) of the Revenue Act of 1951, amended Section 1700(e) of the Code by inserting after the second sentence thereof the following new sentence:

> In no case shall such term include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered, without the application of the preceding sentence, as a "roof garden, cabaret, or other similar place."

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[2]Taxpayer goes outside the record to a January 19, 1951, letter of the Deputy Commissioner of Internal Revenue upon which to base a contention that he was severely penalized by a retroactive application of the cabaret tax to the period beginning in 1948 for dance halls even though the serving of refreshments was incidental. (Point 3, Br. 23-27.) This contention not only is not relevant as to taxpayer but is based upon an erroneous understanding of the letter of January 19, 1951. First, taxpayer began paying cabaret taxes in 1949 (Br. 1), and as he admitted below, he was well aware of the Government's application of the cabaret tax to his establishment. [R. 36.] Secondly, the January 19, 1951, letter referred to by taxpayer (Br. 23-24) and which is not in the record, did not apply retroactively. Taxpayer should have known of this fact since he makes detailed reference later in his brief (pp. 44-45) to *Peony Park v. O'Malley,* 121 Fed. Supp. 690 (Neb.), affirmed, 223 F. 2d 668 (C. A. 8th), certiorari denied, 350 U. S. 845. In that decision, the District Court expressly points out that dance halls which had not been reporting and paying the cabaret tax were to be advised of the liability and "such liability would be incurred effective as of the date of notice from the collector's office." (*Peony Park v. O'Malley,* 121 Fed. Supp., p. 694.) Furthermore, although prior to 1951 there was some lack of uniformity in enforcement due to the uncertainty in the interpretation of the law, there is no question that neither the law nor its enforcement violates the Constitution. (*Peony Park v. O'Malley,* 223 F. 2d 668, 673 (C. A. 8th).)

By subsection (b) of Section 404, the above amendment was specifically and expressly made applicable only with respect to the taxable period after the first day of the first month which begins more than 10 days after the date of the enactment of the 1951 Act. The Revenue Act of 1951 was enacted on October 20, 1951. Therefore, the amendment made by subsection (a) became effective only for the taxable periods beginning after November 1, 1951.

In an effort to escape the effect of the Seventh and Eighth Circuits' decisions in *Avalon, supra,* and *Geer, supra,* the taxpayer contends that the 1951 amendment to Section 1700(e) was merely a "clarification" amendment declaratory of existing law (Br. 40, 53), and should be given retroactive effect as part of the original Section 1700(e).[3] A similar argument was made before the Eighth Circuit in a group of consolidated cases, titled *Peony Park v. O'Malley,* 223 F. 2d 668, certiorari denied, 350 U. S. 845. The Eighth Circuit rejected this contention since it found that the 1951 amendment intended to and did effectuate a change and could not be considered a declaration of existing law. As the Eighth Circuit summarized (*Peony Park v. O'Malley, supra,* p. 672), the Congressional Reports[4] on the—

> 1951 amendment show that Congress was fully aware of the interpretation placed on cabaret taxes by the *Avalon* and the *Geer* cases, and that it was its desire to amend the statute to avoid the construction placed

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[3]As we read taxpayer's brief, we understand Points 2, 4, 5 and 6 of the argument to be directed to this contention.

[4]H. Rep. No. 586, 82d Cong., 1st Sess., p. 126 (1951-2 Cum. Bull. 357, 448), and S. Rep. No. 781, Part 2, 82d Cong., 1st Sess., p. 69 (1951-2 Cum. Bull. 545, 593) (Appendix, *infra*).

> on the original statute by the courts. It seems clear that Congress knew that it was changing the former law as interpreted by the courts. There is nothing in the amendment or in its legislative history to warrent any inference that Congress intended the change to be retroactive. On the contrary subsection (b) of the amendment specifically provides that the amendment "shall be applicable only with respect to periods after [November 1, 1951] * * *."

The District Court also rejected the same contentions when made herein and agreed with the conclusion of the Eighth Circuit in *Peony Park v. O'Malley, supra,* that the amendment was not retroactive. [R. 19.] In reaching this conclusion, the District Court said that not even a tax statute is given retroactive effect unless it is such by its very terms. [R. 19.] This was but the application of the general rule of statutory construction that unless the contrary appears, or in the absence of language plainly indicating the contrary, amendatory legislation must be given only prospective effect and cannot be applied retrospectively. *Hassett v. Welch,* 303 U. S. 303, 307; *Brewster v. Gage,* 280 U. S. 327, 337; *United States v. Magnolia Co.,* 276 U. S. 160, 162; *United States v. St. Louis, etc. Ry. Co.,* 270 U. S. 1; *Fullerton Co. v. Northern Pacific,* 266 U. S. 435, 437; *Southwestern Coal Co. v. McBride,* 185 U. S. 499, 503; *Russell v. United States,* 278 U. S. 181, 187-188; *McDougald v. New York Life Ins. Co.,* 146 Fed. 674, 678 (C. A. 9th); *United States v. Jackson,* 143 Fed. 783, 788 (C. A. 9th); *Mogis v. Lyman-Richey Sand & Gravel Corp.,* 189 F. 2d 130, 142 (C. A. 8th); *Girard Inv. Co. v. Commissioner,* 122 F. 2d 843, 846 (C. A. 3d). Quite apart from

this general rule, however, is the particular fact that Congress specifically provided in Section 404(b) of the 1951 amendment that the amendment was to be applied only with respect to taxable periods beginning November 1, 1951. Both the Eighth Circuit (*Peony Park v. O'Malley, supra*) and the District Court herein [R. 19] gave this fact great weight, noting that Congress itself in amending the section stated that it should be effective only prospectively. Although taxpayer does acknowledge that there was in fact such an effective date (Br. 40), he significantly neglects to explain his confusion as to its meaning in the 1951 amendment.

Apparently to avoid the purport of the above authorities, taxpayer quotes extensively from *Commissioner v. Estate of Holmes,* 326 U. S. 480, and from *Jordan v. Roche,* 228 U. S. 436. The *Holmes* case, *supra,* supports the Director rather than the taxpayer. The *Holmes* case, *supra,* involved a situation in which Congress attempted to avoid a retroactive application of a new amendment, even though it believed that that particular amendment was declaratory of existing law, due to dicta in a Supreme Court decision which raised doubt as to the interpretation of that prior law. When the question came before the Supreme Court in *Holmes, supra,* the Court agreed with the Congressional view of existing law, which was supported by administrative interpretation and by the decisions of the Circuit Courts of Appeals except for the one in review, and reversed that latter circuit. In the instant case, Congress expressly provided an effective date in the future knowing that it was changing the laws as properly construed by the Seventh and Eighth Circuits. It is clear from *Holmes, supra,* that if Congress had desired to make the 1951 amendment herein retroactively

applicable it could have done so. But Congress recognizing the reasonableness and correctness of the construction placed upon Section 1700(a) as it stood in *Avalon Amusement Corp. v. United States,* 165 F. 2d 653 (C. A. 7th), and in *Birmingham v. Geer,* 185 F. 2d 82 (C. A. 8th), certiorari denied, 340 U. S. 951, chose to limit the change to future taxable transactions. The other decision, *Jordan v. Roche,* 228 U. S. 436, is distinguishable from the present situation. A Second Circuit decision gave rise to an amendment changing the law and after the amendment, the Second Circuit itself doubted the correctness of its prior decision and therefore certified the question to the Supreme Court. (*Jordan v. Roche, supra.*) But herein after the 1951 amendment, the Eighth Circuit, whose decision gave rise to that amendment, reaffirmed its previous decision and acknowledged the clear Congressional expression of a prospective effective date. (*Peony Park v. O'Malley,* 223 F. 2d 668).)

In an attempt to refute the holding of the District Court that the 1951 amendment is not to be applied retroactively [R. 19, 24], the taxpayer repeatedly (Br. 31, 34, 35, 43, 46) claims that the amendment was declaratory of existing law because, says taxpayer, Congress said in its Reports (Appendix, *infra*)[5] that the *Avalon* and *Geer* decisions did not reflect the intent of Congress "in enacting the prior law." But the Reports do not say that. The Reports do say that the section amends Section 1700(e) to exempt bona fide dance halls where the sale of refreshments is merely incidental, which amendment

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[5]Taxpayer also refers (Br. 38) to H. Rep. No. 586, 82d Cong., 1st Sess., p. 54 (1951-2 Cum. Bull. 357, 396). The comments above refer to that reference as well as those appearing in the Appendix, *infra.*

shall take effect as of a future day (November 1, 1951). The Reports do say that the purpose of this amendment is to avoid the construction of the *Avalon* and *Geer* decisions, which taxed dance halls as cabarets even though the sale of refreshments was merely incidental. But nowhere in the Reports is there any statement or even indication that the 1951 amendment was declaratory of the meaning of Section 1700(e) as it stood prior to the amendment and that such was not the intent of Congress is seen from the prospective date in the amendment itself. Furthermore, even assuming for the moment that such statements had been made, they would be of no effect for as the District Court noted [R. 18], Congress does not have the power to tell the courts to interpret a statute in a certain way. *Koshkonong v. Burton,* 104 U. S. 668; *Stockdale v. Insurance Companies,* 20 Wall. 323; *Ogden v. Blackledge,* 2 Cranch 272; *Union Iron Co. v. Pierce,* 24 Fed. Cas. 583.

Inasmuch as the 1951 amendment was not applicable to the period in question, the District Court applied Section 1700(e)(1) as amended prior thereto. In so doing the District Court found that both the Seventh and Eighth Circuits, which had passed upon the applicability of the tax to dance halls in the *Avalon* and *Geer* cases, *supra,* were correct in holding such establishments subject to the tax and adopted their interpretation. [R. 17-18.]

II.

Even If the Provisions of Section 404(a) of the Revenue Act of 1951, Amending Section 1700(e) of the Internal Revenue Code of 1939, Were Retroactively Applicable to the Taxable Period Involved in This Case, Taxpayer Was Liable for the Tax.

Even if the 1951 amendment were to be applied retroactively, the taxpayer would not be relieved of his liability for the cabaret taxes in question. Under the tests set forth in *Geer v. Birmingham,* 88 Fed. Supp. 189 (N. D. Iowa), taxpayer's establishment, the Riverside Rancho, does not fall within the exception of the 1951 amendment which excludes from the cabaret tax a "ballroom" or similar place in which the sale of refreshments is "merely incidental."

Inasmuch as taxpayer's sale of food and refreshments was approximately 47% of total sales during the period in question [Deft. Ex. A; R. 44], it certainly was not "merely incidental" so as to exempt the Riverside Rancho from the cabaret tax. *In re Duffin,* 141 Fed. Supp. 869 (S. D. Cal.); *Flores v. Riddell* (S. D. Cal.), decided November 12, 1957 (1957 P-H, par. 44,934.14); *Kantor v. United States,* 154 Fed. Supp. 58 (N. D. Tex.) (1956 P-H, par. 44,555); *Jones v. Fox* (Md.), decided July 11, 1957 (1957 P-H, par. 44,927.6); *compare, Boackle v. United States* (N. D. Ala.), decided October 26, 1956 (1956 P-H, par. 44,617), relied upon by taxpayer (Br. 10), in which the sale of refreshments was held incidental since it was only 27% of total sales. It should be noted that the high percentage sale of food and refreshments is not mentioned in taxpayer's comparison table (Br. 7), although the courts above applying Section 1700(e), as amended in 1951, certainly give great weight to this

factor, as did the District Court in *Geer v. Birmingham,* 88 Fed. Supp. 189, 193, which stressed that only approximately 27% of total sales therein were from the sale of refreshments.

Other factors deemed significant by the District Court in *Geer v. Birmingham,* 88 Fed. Supp. 189 (N. D. Iowa), omitted from taxpayer's table (Br. 7), also indicate that the Riverside Rancho fell within the definition "roof garden, cabaret, or other similar place." The Riverside Rancho encompassed a dining room, a liquor and beer bar, a checkroom, a milk bar, and a hot dog stand as well as a dance area. [R. 60-62.] The admission charge gave patrons unrestricted access to these various facilities of the Riverside Rancho. [R. 62-63.] Only 7,000 square feet of the 43,000 square feet (approximately an acre) was devoted to the dance area. [R. 60-61.] Liquor and beer were served in the Riverside Rancho [R. 60], as contrasted with the *Geer* case, *supra,* in which neither was served. Although no refreshments were allowed in the dance area, patrons could pass freely from the liquor bar to the dance area via a five foot opening. [R. 60-61.] Taxpayer does mention that only benches were provided in his "ballroom." (It is our understanding that at this point taxpayer is referring to the dance area.) (Br. 7.) Considerable additional seating was provided in the dining room and in the liquor bar. [R. 60-61.]

The Director grants that the dance area, if taken by itself, would be a "ballroom." But it is merely part of the Riverside Rancho. It is obvious from the above recital that the Riverside Rancho is so much more than a mere dancing area serving "incidental" refreshments that it is subject to the cabaret tax, even assuming that the

Avalon Amusement Corp. v. United States, 165 F. 2d 653 (C. A. 7th), and *Birmingham v. Geer,* 185 F. 2d 82 (C. A. 8th), construction is not applicable due to the 1951 amendment.

Conclusion.

The decisions of the Seventh and Eighth Circuits set forth the correct interpretation of Section 1700(e) as applicable to this case. In any event, taxpayer's establishment was subject to the cabaret tax since his establishment is not a ballroom wherein the serving of refreshments is incidental. It is respectfully submitted that the taxes here involved were properly assessed. The decision of the District Court is correct and should be affirmed.

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APPENDIX.

Internal Revenue Code of 1939:

SEC. 1700 [as amended by Sec. 542, Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 622 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. Tax.

There shall be levied, assessed, collected, and paid—

(e) *Tax on Cabarets, Roof Gardens, Etc.*—

(1) *Rate.*—A tax equivalent to 20 per centum[6] of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit by or for any patron or guest who is entitled to be present during any portion of such performance. The term "roof garden, cabaret, or other similar place" shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A performance shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance. No tax shall be applicable under subsection (a)(1) on account of an amount paid with respect to which tax is imposed under this subsection.

* * * * * * * *

(26 U. S. C. 1952 ed., Sec. 1700.)

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[6]This rate was changed to 20 per centum by Section 1650 of the Internal Revenue Code of 1939, as added by Section 210 of the Revenue Act of 1940, c. 419, 54 Stat. 516, and amended by Section 302 of the Revenue Act of 1943, c. 63, 58 Stat. 21, and Section 3(a), Public Debt Act of 1944, c. 240, 58 Stat. 272.

Revenue Act of 1951, c. 521, 65 Stat. 452:

SEC. 404. TAX ON CABARETS, ROOF GARDENS, ETC.

(a) *Ballrooms and Dance Halls.*—Section 1700 (e)(1) (relating to tax on cabarets, roof gardens, etc.) is hereby amended by inserting after the second sentence thereof the following new sentence: "In no case shall such term include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered, without the application of the preceding sentence, as a 'roof garden, cabaret, or other similar place'."

(b) *Effective Date.*—The amendment made by subsection (a) shall be applicable only with respect to periods after 10 ante-meridian on the first day of the first month which begins more than ten days after the date of the enactment of this Act.

Treasury Regulations 43 (1941 ed.):

SEC. 101.14 [as amended by T. D. 5192, 1942-2 Cum. Bull. 249]. *Scope of Tax.*—The term "roof garden, cabaret, or other similar place" included any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A public performance furnished at a roof garden, cabaret, or other similar place shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance.

Where music, whether by an orchestra, a mechanical device, or otherwise, and a space in which the patrons may dance is furnished in the dining room of a hotel, or in a restaurant, bar, etc., the entertainment constitutes a public performance for profit at a roof garden, cabaret, or similar place, and the payments made for admission, refreshment, service, and merchandise are subject to the tax.

* * * * * * * *

Examples. (1) A proprietor of a dancing establishment provides for the serving of refreshments to his patrons. An admission or cover charge is made to each patron. In this case the admission or cover charges and also the charges for refreshment, service, and merchandise are subject to the tax.

* * * * * * * *

H. Rep. No. 586, 82d Cong., 1st Sess., p. 126 (1951-2 Cum. Bull. 357, 448):

SEC. 404. TAX ON CABARETS, ROOF GARDENS, ETC.

This section amends section 1700 (e) (1) of the Internal Revenue Code to exempt from the cabaret tax bona fide dance halls, ballrooms, and other similar places where the serving or selling of food, refreshments, or merchandise is merely incidental to the music and dancing privileges furnished unless the conduct of the place is such as to bring it within the normal concept of a roof garden, cabaret, or similar place. This determination will be made by reference to the over-all operation of the establishment, including such factors as the relative income from the several activities over a period of time, the relative portion of space devoted to the various activities, the

type of refreshments served or sold, the scope and character of the entertainment furnished, and the hours of operation.

The purpose of this amendment is to make it clear that the principles set forth by the district court in the case of *Geer v. Birmingham* (88 Fed. Supp. 189) are controlling in the determination of whether the establishment involved is operating as a cabaret or as a dance hall, and to avoid the broad construction placed upon the statute in the case of *Avalon Amusement Corporation v. United States* (165 Fed. 2d 653) and in the court of appeals decision reversing the decision of the district court in the *Geer* case (*Birmingham v. Geer,* 185 Fed. 2d 82), which requires that dance halls and similar establishments be taxed as cabarets even though the serving or selling of food, refreshments, or merchandise is merely incidental.

The amendment made by this section shall take effect at 10 a. m. on the 1st day of the first month which begins more than 10 days after the date of the enactment of this bill.

S. Rep. No. 781, Part 2, 82d Cong., 1st Sess., p. 69 (1951-2 Cum. Bull. 545, 593):

SEC. 404. TAX ON CABARETS, ROOF GARDENS, ETC.

This section, which is identical with section 404 of the House Bill, amends section 1700 (e) (1) of the Code to exempt from the cabaret tax bona fide dance halls, ballrooms, and other similar places where the serving or selling of food, refreshments, or merchandise is merely incidental to the music and dancing privileges furnished unless the conduct of the place is such as to bring it within the normal concept of a

roof garden, cabaret, or similar place. This determination will be made by reference to the over-all operation of the establishment, including such factors as the relative income from the several activities over a period of time, the relative portion of space devoted to the various activities, the type of refreshments served or sold, the scope and character of the entertainment furnished, and the hours of operation.

The purpose of this amendment is to make it clear that the principles set forth by the district court in the case of *Geer v. Birmingham* (88 Fed. Supp. 189) are controlling in the determination of whether the establishment involved is operating as a cabaret or as a dance hall, and to avoid the broad construction placed upon the statute in the case of *Avalon Amusement Corporation v. United States* (165 Fed. (2d) 653) and in the court of appeals decision reversing the decision of the district court in the *Geer* case (*Birmingham v. Geer,* 185 Fed. (2d) 82), which require that dance halls and similar establishments be taxed as cabarets, even though the serving or selling of food, refreshments, or merchandise is merely incidental.

The amendment made by this section shall take effect at 10 a. m., on the first day of the first month which begins more than 10 days after the date of the enactment of this Act.